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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-14-0726

State of Alabama

v.

Niekro Hurst

Appeal from Jefferson Circuit Court
(CC-09-1394.60)

On Return to Remand

JOINER, Judge.

The State of Alabama appeals the circuit court's decision to grant Niekro Hurst's Rule 32, Ala. R. Crim. P., petition for postconviction relief. See Rule 32.10, Ala. R. Crim. P.

On March 22, 2010, Hurst was convicted of first-degree rape, see § 13A-6-61(a)(1), Ala. Code 1975, and second-degree rape, see § 13A-6-62(a)(1), Ala. Code 1975, and was sentenced to 20 years' imprisonment and 10 years' imprisonment, respectively. This Court affirmed Hurst's convictions and sentences in an unpublished memorandum issued on May 20, 2011, Hurst v. State (No. CR-09-1001, May 20, 2011), 107 So. 3d 229 (Ala. Crim. App. 2011) (table), and issued a certificate of judgment on September 9, 2011.

On August 26, 2014, Hurst filed a Rule 32, Ala. R. Crim. P., petition, alleging that his trial counsel was ineffective because, he said, his trial counsel told him that, "if he testified[,] the prior charge of murder, which was dismissed[,] could or would be offered against him" and that his trial counsel "failed to bring out the issue that the victim was pregnant and had an abortion." (C. 24.) Additionally, Hurst explained that, although his petition was untimely, see Rule 32.2(c), Ala. R. Crim. P., "[t]his is an out of time Petition for Rule 32 due to the Attorney John S. Waddell's ... failure to complete the filing of the timely filed Rule 32." (C. 25.)

To support his claim that his untimely filed petition should be excused, Hurst attached to his petition two exhibits: (1) an e-mail from an assistant clerk in the Jefferson County Circuit Court clerk's office to John Waddell, dated June 4, 2013, indicating that Crocker had received a Rule 32 petition filed by Waddell on Hurst's behalf but "[i]n order to proceed with the in forma pauperis declaration, [she] must have an account summary for the last 12 months from [Hurst's] facility" (C. 28); and (2) an affidavit executed by Hurst explaining that "Attorney John S. Waddell was hired by [his] family to do a Rule 32, but Attorney Waddell did not file the Rule 32 correctly." (C. 27.)

In other words, Hurst, in his petition, recognized that his Rule 32 petition was, on its face, time-barred under Rule 32.2(c), Ala. R. Crim. P., but he requested that the circuit court apply the doctrine of equitable tolling to his petition, and he submitted exhibits to support his request.

On October 16, 2014, the State filed a motion to dismiss Hurst's Rule 32 petition, alleging, among other things, that Hurst's petition was time-barred under Rule 32.2(c), Ala. R.

Crim. P., and that Hurst's claims of ineffective assistance of counsel were without merit.

On October 20, 2014, the circuit court ordered that an evidentiary hearing be held on Hurst's petition; the hearing was conducted on February 23, 2015. At the hearing, Hurst was represented by counsel and presented the testimony of only one witness--his trial counsel, William Ware. Hurst presented no testimony to support his claim that the doctrine of equitable tolling should apply to his untimely filed petition.¹

At the conclusion of the hearing, the circuit court granted Hurst's Rule 32 petition stating on the record the reason it believed Hurst's trial counsel was ineffective and, thereafter, memorialized its decision in a written order, finding:

"After hearing, the defendant's Petition For Relief Pursuant to Rule 32 is hereby granted. A new trial is hereby ordered for May 11th 2015 at 9:00 a.m. The defendant's prior bond is hereby reinstated."

¹Although Hurst did not present any testimony to support his assertion of the doctrine of equitable tolling, as stated above, Hurst attached to his Rule 32 petition two exhibits to support his assertion of the doctrine of equitable tolling, which may be used by the circuit court as evidence in lieu of testimony. See Rule 32.9(a), Ala. R. Crim. P.

(C. 15.) The circuit court did not address Hurst's equitable-tolling claim either at the conclusion of the evidentiary hearing or in its written order granting Hurst's petition.²

On appeal, the State contends, among other things, that the circuit court erred when it granted Hurst's petition and ordered that he receive a new trial because, the State says, Hurst's petition was time-barred under Rule 32.2(c), Ala. R. Crim. P., and Hurst failed to prove that he was entitled to the doctrine of equitable tolling.

Before we can address the State's claims on appeal, however, we note that, although Hurst asserted the doctrine of equitable tolling in his petition, the circuit court, as

²This Court, on August 20, 2015, remanded this case to the circuit court for that court to make specific, written findings of fact as to whether, before the circuit court ruled on Hurst's petition, it granted a request to proceed in forma pauperis or Hurst paid the required filing fee. See Whitson v. State, 891 So. 2d 421, 422 (Ala. Crim. App. 2004) ("[A]bsent the payment of a filing fee or the grant of a request to proceed in forma pauperis, [a] circuit court does not obtain jurisdiction over [a] postconviction petition."). The circuit court complied with our instructions and issued an order finding that Hurst "did in fact pay the required filing fee of two hundred and six (206.00) dollars to the Circuit Clerk of Jefferson County." (Record on Return to Remand, C. 7.)

explained above, did not make any findings of fact regarding the applicability of the doctrine of equitable tolling to Hurst's petition. Thus, it is unclear whether the circuit court determined that the doctrine of equitable tolling applied in this case.

The following is well settled:

"If ... the [circuit] court holds a hearing, then Rule 32.9, Ala. R. Crim. P., provides, in pertinent part, as follows:

"'(a) Hearing. Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact

"'....

"'(d) Findings of Fact. The court shall make specific findings of fact relating to each material issue of fact presented.'

"Thus, the trial court must first determine whether the petition raises 'material issue[s] of fact or law ... which would entitle the petitioner to relief under [Rule 32].' Rule 32.7(d). Once a hearing is held on those issues, the trial court is required to make findings of fact as to each of the material issues upon which the hearing was held. See Ex parte Grau, [792 So. 2d 345 (Ala. 2000)]."

Ex parte McCall, 30 So. 3d 400, 403 (Ala. 2008) (emphasis added; footnote omitted).

Here, by ordering that an evidentiary hearing be held on Hurst's petition, which was, on its face, time-barred, the circuit court concluded that Hurst's claims of equitable tolling and ineffective assistance of counsel were "material issues" to be proved by Hurst at the evidentiary hearing. See Rule 32.3, Ala. R. Crim. P. ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."). Because both Hurst's equitable-tolling claim and his ineffective-assistance-of-counsel claim were "material issues" to be proved at the evidentiary hearing, the circuit court was required to make specific findings of fact as to both claims.³

³This is not a situation where the granting of relief as to one claim renders moot Hurst's remaining claims. Rather, here, because Hurst's petition was, on its face, time-barred and the State did not waive the affirmative defense under Rule 32.2(c), Ala. R. Crim. P., the circuit court could not logically reach Hurst's ineffective-assistance-of-counsel claim without first determining whether Hurst was entitled to equitable tolling.

Because the circuit court did not make specific, written findings of fact as to Hurst's equitable-tolling claim--a claim that was a "material issue" to be proved by Hurst at the evidentiary hearing--we remand this case to the circuit court for that court to make specific, written findings of fact with regard to Hurst's equitable-tolling claim. See Rule 32.9(d), Ala. R. Crim. P. On remand, the circuit court shall take all necessary steps to ensure that the circuit clerk makes due return to this Court at the earliest possible time, and within 28 days of the date of this opinion.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum and Burke, JJ., concur. Welch, J., dissents.